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539, 71 N. E. 1084; *cf.* Uniform Sales Act §§ 19 Rule 4—(1) & (2), 63 (1). The seller unconditionally delivered to a bailee for the buyer with the latter's previous assent. *Main* v. *Jarrett* (1907) 83 Ark. 427, 104 S. W. 163; *White* v. *Solomon* (1895) 164 Mass. 516, 42 N. E. 104. If the notice by the buyer to the seller amounted to a refusal to receive further shipments, then his assent to take title in the manner prescribed in the contract was withdrawn and the appropriate remedy of the seller was in *special assumpsit* for wrongful breach of contract. See Uniform Sales Act § 64. Where, as in the instant case, the goods were readily marketable, the result would, according to the weight of authority at common law, be the same as that reached under this section of the Act, which, however, is a departure from the old New York rule *Moody* v. *Brown* (1852) 34 Me. 107; *cf. Puritan Coke Co.* v. *Clark* (1903) 204 Pa. St. 556, 54 Atl. 350; *Bement* v. *Smith* (N. Y. 1836) 15 Wend. 493. But the seller, having consistently maintained his position, should be allowed his action for the price, since the shipping order was an act consonant only with ownership in the defendant and should therefore be construed as a waiver of his prior objections. *Wolf Co.* v. *Refrigerating Co.* (1911) 252 Ill. 491, 96 N. E. 1063; see Williston, Sales, 843, 845.

SALES—CONDITIONAL SALE OR MORTGAGE—SECTION 65 N. Y. PERSONAL PROPERTY LAW.—A sold B a motor truck and in a written contract reserved title in himself until the purchase price should be paid, and in the same instrument provided for the execution of a chattel mortgage back to A. Simultaneously with the execution of the contract, the mortgage was given. In an action by B to recover the price already paid, after A had retaken and sold the truck, *held,* the transaction being a conditional sale, and the resale violating sec. 65 of the Personal Property Law, B may recover. *Warren* v. *Lair* (N. Y. App. Div., 3rd Dept., 1919) 190 App. Div. 139.

In a contract of conditional sale, an express waiver of the statute is nugatory. *Crowe* v. *Liquid Carbonic Co.* (1913) 208 N. Y. 396, 102 N. E. 573. Nor is a waiver, though after default, valid if there is no consideration. *Adler* v. *Weis & Fisher Co.* (1916) 218 N. Y. 295, 112 N. E. 1049; *Cee Bee Cee Waist Co* v. *Birenstein* (1917) 164 N. Y. Supp. 703. But if after such default, the parties make a new agreement for consideration, the case is taken out of the statute. *Seeley* v. *Prentiss Tool & Supply Co.* (1913) 158 App. Div. 853, 144 N. Y. Supp. 48, aff'd 216 N. Y. 687, 110 N. E. 1049; *Breakstone* v. *Buffalo Foundry & Machine Co.* (1915) 167 App. Div. 62, 152 N. Y. Supp. 394; *Nyboe* v. *Jacob Doll & Sons* (1915) 167 App. Div. 225, 152 N. Y. Supp. 650; *Boschen* v. *Multicolor Sales Co.* (1917) 98 Misc. 637, 163 N. Y. Supp. 202. The statute was passed to protect vendees from the harsh and oppressive terms, which at common law might have been written into contracts of conditional sale, and has therefore received a liberal construction. If the facts of the instant case be taken to be a waiver, clearly such provisions were invalid. Where a purchase price mortgage is given *ab initio* the transaction does not fall under sec. 65. *Gaul* v. *Goldburg Furniture & Carpet Co.* (1914) 85 Misc. 426, 147 N. Y. Supp. 516; *McMails* v. *Michaels* (1914) 147 N. Y. Supp. 516; *Sheeley* v. *Holmes Music Co.* (1919) 179 N. Y. Supp. 202. The same result is reached where a contract of conditional sale provides for the execution of a purchase price mortgage, which is done in a subsequent transaction. *Nordone* v. *Austin Drainage Excavation Co.* (1918) 184 App. Div. 309, 171 N. Y. Supp. 725. Although there is no insuperable

difficulty in one who has no legal title, giving a mortgage, *Flagg* v. *Mann* (U. S. 1837) 2 Sumn. 486, some courts seem doubtful about such a possibility. *Tweedie* v. *Clark* (1906) 99 N. Y. Supp. 856, see *Alexander* v. *Kellner* (1909) 131 App. Div. 809, 812, 116 N. Y. Supp. 98. But quite apart from the reasoning in *Tweedie* v. *Clark, supra,* the result reached in the instant case seems sound. Where parties attempt to graft a mortgage and a conditional sale contract upon one instrument, the provisions being contradictory, they should be construed against the party who drew them up, in this case the vendor.

STATUTE OF FRAUDS—CHECK AS PART PAYMENT.—The defendant vendor entered into an oral executory contract with the plaintiff for the sale of lambs, at a price exceeding fifty dollars. The parties intended the proceeds of the check to be in part payment of the purchase price, but there was no evidence that it was accepted as absolute payment. Subsequently, the check was destroyed by the defendant before presentation for payment. *Held,* the check was not such part payment as to take the contract out of the Statute of Frauds. *Gay* v. *Sundquist* (S. D. 1919) 175 N. W. 190.

"Part payment" within the meaning of the Statute of Frauds need not be in money but may be by anything of value given and accepted as part of the price. See *Rohrbach* v. *Hammill* (1913) 162 Iowa 131, 138, 143 N. W. 872. And so it has been held that a check given and accepted under an express agreement that it shall be absolute payment takes the case out of the Statute of Frauds. *Rohrbach* v. *Hammill, supra; Logan* v. *Carroll* (1897) 72 Mo. App. 613. There is no presumption of such an express agreement merely from the vendor's acceptance of the check; but the burden is on the party seeking to enforce the agreement to prove it. *Groomer* v. *McMillan* (1910) 143 Mo. App. 612, 128 S. W. 285. In the absence of such proof, the check will not be deemed such absolute payment as to take the case out of the Statute of Frauds. *Bates* v. *Dwinell* (1917) 101 Neb. 712, 164 N. W. 722; *Davis* v. *Phillips, Mills & Co.* (1907) 24 T. L. R. 4. But where the check has been presented and paid that will be sufficient part payment. *Hunter* v. *Wetsell* (1881) 84 N. Y. 549; see *Jones* v. *Wattles* (1902) 66 Neb. 533, 539, 92 N. W. 765. In the instant case, there was no express agreement to accept the check as absolute payment and it was not paid, so the Statute of Frauds was held to apply. Since a check is itself dealt with as cash, there seems to be no reason why it should not be sufficient payment, provided, of course, that the vendee has funds in the bank and does not interfere with its payment. *Cf. McLure* v. *Sherman* (C. C. A. 1895) 70 Fed. 190, 192.

TELEGRAPH AND TELEPHONE COMPANIES—STIPULATIONS LIMITING LIABILITY—VALIDITY.—The defendant sought to limit its liability for non-delivery of a message delivered to its messenger by a patron by means of a stipulation which provided that "if a message is sent by one of the company's messengers, he acts for that purpose, as the agent of the sender". *Held,* the stipulation is valid. *Collotta* v. *Western Union Tel. Co.* (Miss. 1920) 83 So. 401.

In the absence of a stipulation of this sort, a person provided by the company to receive messages is the agent of the company. *Postal Tel. Cable Co.* v. *Prewitt* (Tex. 1917) 199 S. W. 316. The stipulation, however, has been held to change this result. *Stamey* v. *Western Union Tel. Co.* (1894) 92 Ga. 613, 18 S. E. 1008. The test of the validity of stipulations limiting the liability of telegraph companies is its reason-